Original

88-5746

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BERNARD LEE HAMILTON, *Petitioner*

vs.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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QUESTIONS PRESENTED

I

Did the California Supreme Court deprive petitioner of procedural due process when it ignored this Court's limited remand for further consideration in light of *Rose v. Clark* (1986) 478 U.S. 570, treated this Court's order instead as the equivalent of a summary reversal, and sua sponte reconsidered and decided adversely to Petitioner certain issues unaffected by the terms of this Court's limited remand?

II

Was the trial court's denial of Petitioner's timely motion to represent himself at the penalty phase a denial of Petitioner's Sixth Amendment right to represent himself and to personally plead for his own life?

III

Did the instructions of the trial court coupled with the prosecution's voir dire and closing argument mislead the jury concerning the discretion it had to extend leniency by informing the jury that they had no choice but to vote for the death penalty if the factors in aggravation outweighed those in mitigation even if the jurors still felt that, under those circumstances, death was not the appropriate punishment?

LIST OF PARTIES (RULE 28.1)

The parties to the proceedings below were petitioner Bernard Lee Hamilton and respondent State of California.

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No._____

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Petitioner BERNARD LEE HAMILTON respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of California, entered in the above entitled proceeding on May 19, 1988.

OPINIONS BELOW

The opinion of the California Supreme Court is reported at *People v. Hamilton* (1988) 45 Cal.3d 351 and is reproduced in the Appendix hereto at A-1 through A-35.

JURISDICTION

This case comes before this Court following the granting of Respondent's petition for writ of certiorari by this Court on July 7, 1986. *California v. Hamilton* (1986) 478 U.S. 1017. In that order, this Court vacated the opinion of the California Supreme Court in *People v. Hamilton* (1985) 41 Cal.3d 408 and remanded the case, "for further consideration in light of *Rose v. Clark*. 478 U.S. [570] (1986)"

Following this Court's remand, the judgment of the Supreme Court of California was entered on May 19, 1988, affirming petitioner's conviction for capital murder and sentence of death. Petitioner filed a Petition for Rehearing. (Appendix 36-60) The

California Supreme Court denied that petition on July 28, 1988. (Appendix at A-61-62).

Thereafter, Justice O'Connor signed an order extending the time for filing this petition for writ of certiorari to and including October 26, 1988. (Appendix at 63)

On August 31, 1988, the California Supreme Court issued an order staying petitioner's execution pending final determination of this petition for writ of certiorari. (Appendix at 64)

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

STATUTES AND CONSTITUTIONAL AUTHORITIES INVOKED

United States Constitution, Fifth, Sixth, Eighth and Fourteenth Amendments, and California Penal Code §§187 *et seq*.., California Rules of Court 24 (a) (See Appendix 65-72 for verbatim statement of these authorities.)

STATEMENT OF THE CASE

On May 31, 1979, the body of Eleanor Buchanan was discovered in a wooded area in San Diego County, California; the body was missing its head and hands. The victim was last seen alive leaving her math class at Mesa College on the evening of May 30th.

On June 1st, petitioner arrived in Terrell, Texas in a van belonging to the victim. A week later, petitioner was arrested in Oklahoma for using credit cards belonging to the victim. When the police ran a check on the VIN number of the van petitioner was driving, they found out that the van belonged to a homicide victim. Petitioner was returned to California to stand trial.

On July 11, 1979, petitioner was accused by information of one count each of murder, burglary, robbery, and kidnapping. In addition, three special circumstances were alleged in connection with the murder charges, thus making this a capital case. Cal. Pen. Code §§ 190.2 (17) (i), (ii), and (vii)

Jury trial commenced on September 8, 1980. On January 6, 1981, the jury returned verdicts of guilty on all counts. On that same

day, petitioner filed a motion to proceed *in propria persona* at the penalty phase of his trial; petitioner filed another similar motion on January 9, 1981. On January 15, 1981, petitioner's motion to proceed *in pro per* was heard with the other pre-penalty phase motions and was denied.

The presentation of evidence in the penalty phase began on January 20, 1981 and on February 2, 1981, the jury returned a verdict of death.

Petitioner appealed his conviction to the California Supreme Court and on December 31, 1985, the California Supreme Court issued its opinion in *People v. Hamilton* (1985) 41 Cal.3d 408, reversing both the special circumstance and penalty verdicts and remanding the case for a new trial on those issues.

On April 18, 1986, Respondent filed a petition for certiorari with this Court and on July 7, 1988, this Court granted the petition, vacated the judgment of the California Supreme Court and remanded petitioner's case for "for further consideration in light of *Rose v. Clark*, 478 U.S. [570] (1986)." *California v. Hamilton* (1986) 478 U.S. 1017

Following this Court's remand, the judgment of the Supreme Court of California was entered on May 19, 1988, affirming petitioner's conviction for capital murder and his sentence of death. In its opinion, the California court held that this Court's remand "for further consideration" rendered its decision in *Hamilton I* "a nullity and as such has no binding force." 45 Cal.3d at 363

The California Supreme Court denied a timely petition for rehearing on July 28, 1988.

ARGUMENT

I

THE CALIFORNIA SUPREME COURT DEPRIVED PETITIONER OF PROCEDURAL DUE PROCESS WHEN IT IGNORED THIS COURT'S LIMITED REMAND FOR FURTHER CONSIDERATION IN LIGHT OF ROSE V. CLARK (1986) 478 U.S.570, TREATED THIS COURT'S ORDER INSTEAD AS THE EQUIVALENT OF A SUMMARY REVERSAL, AND SUA SPONTE RECONSIDERED AND DECIDED ADVERSELY TO PETITIONER CERTAIN ISSUES UNAFFECTED BY THE TERMS OF THIS COURT'S LIMITED REMAND

A

Statement of Facts

In its first decision in petitioner's case, *People v. Hamilton* (1985) 41 Cal.3d 408 (hereinafter, *Hamilton I*), the California Supreme Court affirmed petitioner's murder conviction, but reversed the jury's findings of special circumstances (which made defendant death eligible) because the jury was not instructed that must find that the defendant intended to kill. *Carlos v. Superior Court* (1983) 35 Cal.3d 131

Following this Court's remand for "further consideration in light of *Rose v. Clark* (1986) 478 U.S. 570" *California v. Hamilton* (1986) 478 U.S. 1017, the California Supreme Court issued its opinion in *People v. Hamilton* (1988) 45 Cal.3d 351 (hereinafter, *Hamilton II*). Instead of complying with this Court's specifically limited remand to reexamine its decision in *Hamilton I* in light of the harmless error test of *Rose v. Clark, supra*, the California Supreme Court held, without benefit of citation to relevant authority, that *Hamilton I* was "a nullity."

Without so much as a cursory discussion the harmless error test of *Rose v. Clark, supra*, the California Supreme Court unilaterally redetermined adversely to petitioner its prior holding of underlying instructional error in the special circumstance findings; the court's decision in *Hamilton II* was based upon a case decided by that court after this Court's remand order. The California court incorporated, without restating, *Hamilton I*'s discussion of guilt phase issues and went on to find that the death penalty was properly imposed.

In sum, the California Supreme Court failed entirely to comply with this Court's instructions and, instead, arrogated to itself the wholly different task of reconsidering other issues unrelated to and outside the scope of the order of this Court. The one thing the California Supreme Court did not do was to obey this Court's order to simply reexamine its decision in *Hamilton I* in light of *Rose v. Clark*, *supra*,.

B

This Court's remand of Petitioner's case for "further consideration in light of *Rose v. Clark* " did not render the decision in *Hamilton I* "a nullity."

In the only case in which a majority of this Court has discussed the scope of "granted, vacated, and remanded for further consideration" order, this Court has explicitly held that a remand for further consideration in light of an intervening case, "[does] not amount to a final determination on the merits." *Henry v. City of Rock Hill* (1964) 376 U.S. 776, 777[1] In *Henry*, *supra*, this Court had remanded a case to the South Carolina Supreme Court for, "further consideration in light of *Edwards v. South Carolina* 372 U.S. 229." The Court noted that,

> "That has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent, we remand the case to the state court for reconsideration." *Id.* at 776

After noting that the remand "did not amount to a final determination on the merits," this Court added,

> "That order did, however, indicate that we found *Edwards* sufficiently analogous and, perhaps, decisive to compel re-examination of the case." *Id.* at 777 [2]

[1] The only other case decided by a majority of this Court which discusses this issue that counsel has been able to locate is *Goldbaum v. United States* (1954) 348 U.S. 905, 906, another case remanded for reconsideration in light of intervening precedent where this Court noted, *inter alia*, that

> "[w]e have not considered the merits of these cases, nor have we determined their relation to our recent opinions, *supra*, believing that re-examination by the Courts of Appeals is desirable even in those cases remotely involving the principles laid down in the...decisions."

In *Trustees of Keene State College v. Sweeney* (1978) 439 U.S. 24, Justice Stevens briefly discussed the issue in dissent.

[2] The Fifth Circuit has similarly characterized the "reconsideration" order.

It follows that a remand which is not in itself a final judgment on the merits can hardly be said to render a final judgment of a state Supreme Court a "nullity." Yet that is exactly how the California Supreme Court characterized this Court's remand in petitioner's case, "for further consideration in light of *Rose v. Clark*." Significantly, the California Supreme Court has also recently equated the limited remand in petitioner's case with this Court's order in *California v. Brown* (1987) _ U.S.__, 107 S.Ct. 837, 841 where this Court reversed the California court's decision and, "remanded [the cause] for further proceedings not inconsistent with this opinion." *People v. Brown* (1988) 45 Cal. 3d 1247[3]

This Court conducts its review on an issue by issue basis as presented in the petitions for writ of certiorari, not on a case by case basis in which a petitioner presents his entire case for review at large. *J.I. Case Co. v. Borak* (1964) 377 U.S. 426 This Court will not reach issues not presented in the petition for certiorari. *Heath v. Alabama* (1985) __U.S.__, 106 S.Ct. 433 If this Court had granted certiorari on the *Rose v. Clark* issue and decided it, the remainder of the California decision would have remained in full force and effect and the California Supreme Court could not have used it as a vehicle to reopen other issues.

By misinterpreting the effect of this Court's remand, the California Supreme Court also violated petitioner's right to

> "It is our understanding in this type of remand that the Court has merely 'flagged' this case as one upon which the intervening decision may have some bearing, but which the court has not conclusively determined to be materially affected thereby." *Bush v. Lucas* (5th Cir. 1981) 647 F.2d 573, 575

The Ninth Circuit has likewise rejected the conclusion that a remand for reconsideration in light of an intervening precedent is the equivalent of a summary reversal.

> "It would be all but impossible to distinguish between cases in which only reconsideration was intended and those in which reversal was thought proper. Consequently, our duty is to read the intervening Supreme Court decision fairly and determine whether it requires a different result." *Ostrofe v. H.S. Crocker., Inc.* (9th Cir. 1984) 740 F.2d 739, 748

[3] Compare the statement in *Brown*, *supra*, "Our judgment was reversed and the cause remanded for proceedings not inconsistent with the high court decision. (*California v. Brown* (1987) 479 U.S.__)....[The] vacation of this court's 'judgment' technically leaves all appellate issues at large" 45 Cal.3d at 1251, with *Hamilton*, *supra* , "the United States Supreme Court vacated the judgment in *Hamilton I* and rendered the decision a nullity." 45 Cal.3d at 363

procedural due process by reexamining issues that were beyond the scope of the remand. California Rules of Court 24 (a) provides that,

> "A decision of the Supreme Court becomes final 30 days after filing...When a decision of a reviewing court is final as to that court, it is not thereafter subject to modification or rehearing by that court..."

Petitioner was entitled to the dispositive effect of Rule 24 and the California court's evisceration of that right through the device of unilaterally expanding the scope of this Court's remand violated due process. It is fundamental that a deprivation of state procedural due process is a violation of federal due process. *Hicks v. Oklahoma* 447 U.S. 343 (1979) This is especially true in a death penalty case.

C.

Why this Court should grant Certiorari.

In the October, 1985 term, the same term in which this Court remanded petitioner's case, "for further consideration in light of...", this Court took similar action with regard to over seventy other cases. Yet despite the frequency with which this Court uses that procedural device to afford lower courts the opportunity to reexamine their decisions in light of intervening decisions of this Court, *Henry v. City of Rock Hill, supra*, is the only case that discusses the significance of this action in any detail, and in that case, the discussion is contained in a mere three sentences.

Moreover, except for Professor Hellman's law review article, Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases held for Plenary Decisions*, 11 Hast. L. Rev 5 (1983) and a paragraph in Stern, Gressam and Shapiro, *Supreme Court Practice* (6th ed. 1986)[4] *Henry, supra*, has been cited only **three times** [5] for its relevant discussion in the twenty four years that have elapsed since that

[4] The fifth edition (1978) covered the subject in a single sentence accompanied by a brief footnote.

[5] *United States v. National Society for Professional Engineers* (D.C. Cir. 1975) 404 F.Supp 4597, 459; *State v. Anderson* (1971) 260 La. 113, 255 So.2d 348; *Commonwealth v. Rundle* (1964) 203 Pa. Super. 419, 201 A.2d 615

decision was announced. This is true despite the fact that this Court has issued an average of **sixty** such "GVR" dispositions a year[6] since the early 1970's. This may well be related to the fact that this Court's three sentence explanation of the meaning of "GVR" in *Henry* did not even merit a headnote in the official printed version of that decision.[7]

This has led to confusion as to exactly what this Court means by the order, "granted, vacated, and remanded for further consideration in light of..." As Professor Hellman notes,

> "[T]he significance of this form of disposition...remains a mystery to most of the legal profession. For example, some judges assume that a summary reconsideration order means no more than what it says: the lower court must reconsider its prior ruling, but it is free to reach the same result once again after the remand. Others think that the GVR is a reversal in all but name. The Supreme Court has given few clues to what it means by these orders, and little guidance is to be found in the secondary literature." Hellman, *The Supreme Court's Second Thoughts..., supra*, at 6 (footnotes omitted)

The confusion among the bench and bar and the obscurity of the *per curiam Henry* decision is best exemplified by the proceedings in petitioner's case. Despite the fact that, following the remand of this case to the California Supreme Court, there were a total of five supplemental briefs submitted by both petitioner and respondent and two oral arguments before the California Supreme Court, not once did counsel for either side or, for that matter, the court, refer to *Henry, supra*, its short line of progeny, or Professor Hellman's article when the effect of this Court's remand was discussed. The first time *Henry et al.* was brought to the California Supreme Court's attention was in the petition for rehearing filed by petitioner.

Counsel has found no other decision where a court has treated a "GVR" as affecting its previous opinion except as to those issues

[6] Hellman, *supra*, p.7 Interestingly, although Professor Hellman cites numerous cases in which the effect of a 'GVR' was discussed by the lower court, not one of them cited *Henry, supra*.

[7] There was a headnote, however, in the West edition of that decision located at 84 S.Ct. 1042.

highlighted by the reconsideration order and none where a court has treated it as rendering the opinion in its entirety a "nullity."

Because of the California Supreme Court's misunderstanding of this Court's remand order, instead of receiving a new trial on the special circumstance, and if necessary, the penalty phase of petitioner's case, as ordered by that court in *Hamilton I*, petitioner now awaits execution. This Court should grant certiorari to clearly explain the scope of a "GVR" order. Whatever meaning this Court supplies, it should not permit a state court to re-open issues otherwise foreclosed to it in violation of this Court's remand order.

II

THE TRIAL COURT'S DENIAL OF PETITIONER'S TIMELY MOTION TO REPRESENT HIMSELF AT THE PENALTY PHASE A DENIAL OF APPELLANT'S SIXTH AMENDMENT RIGHT TO REPRESENT HIMSELF AND TO PERSONALLY PLEAD FOR HIS OWN LIFE

A

Statement of Facts

On January 6, 1981, petitioner was found guilty of first degree murder and the special circumstances alleged were also found to be true. Immediately following the verdict, the trial court informed the jury that the penalty phase of the trial would not start until January 19th. (R.T. 4281)

On that same day the verdict was reached, petitioner filed a motion to proceed *in propria persona* at the penalty phase of his trial. (C.T. 1202-1203) Petitioner's motion was considered with the other pre trial motions on January 15, 1988. At that hearing, after indicating some of the sources of his displeasure with counsel's performance at the preceding trial, petitioner made it crystal clear that he wanted to represent himself, to personally plead for his own life.

> "I don't want any representation by any court appointed attorney. I would prefer to represent myself. I felt that if the Faretta decision -- I felt that was quite explicit as far as my right to representation."
>
> *****
>
> "I feel that it is my life on the line and I am the one who has to answer to everything that is charged against me, and if I feel that my attorney is not going to represent me adequately and if he is going to present a defense or a case inconsistent to that what I want to present, then I should be permitted to represent myself, in which the Faretta decision made clear that if I do represent myself and I am convicted, that I can't complain about inadequate representation. I can't use that at a later date..."
> (R.T. 4314-4315)

The trial court denied his motion, noting that his attorneys had "done an outstanding job in their representation of defendant." The court went on to state that:

> "[I]t would be a real travesty and a mockery if I were to permit Mr. Hamilton to represent himself...I have found it necessary

for Mr. Hamilton to be handcuffed and in shackles...He certainly can't represent himself being in chains...He has put stumbling blocks in the path of his attorneys. He has made suggestions which were absolutely preposterous as far as trial tactics are concerned...I can't conceive of Mr. Hamilton representing himself in this final phase of the trial..." (R.T. 4320-4321)

Although observing that petitioner's shackling was not relevant to his entitlement to act as his own lawyer, the California Supreme Court upheld the trial court's ruling, noting that,

> "[b]ecause defendant's request was filed in the midst of the jury's guilt phase deliberations, it was not timely for purposes of invoking an absolute right of self representation under *Faretta v. California, supra*, 422 U.S. 806" 45 Cal.3d at 369

The court rejected petitioner's contention that he had an absolute right to self representation because the motion was made two weeks before the penalty phase began, and that for the purposes of *Faretta* motion, the penalty phase was in reality, a separate trial.

> "The penalty phase has no separate formal existence, but is merely a stage in a unitary capital trial." 45 Cal.3d at 369

B

Petitioner was Denied his Right to Represent Himself and to Personally Plead for his Own Life in Violation of the Sixth Amendment of the United States Constitution

In *Faretta v. California* (1975) 444 U.S. 806, this Court held that a defendant in a criminal case has the absolute right to refuse appointed counsel and to represent himself.

> "The language and spirit of the Sixth Amendment contemplate that counsel...shall be an aid to a willing defendant - not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment." *Id.* at 820

Although *Faretta,supra*, does not itself address the issue of "timeliness," perhaps because the motion in that case was made, "weeks before trial." 422 U.S. 836, the California Supreme Court has held that a motion for representation that is not "timely made" is discretionary. *People v. Windahm* (1977) 19 Cal.3d 121

Petitioner, however, like the defendant in *Faretta, supra*, made his motion to represent himself, "weeks before trial;" there was a

fourteen day hiatus between the rendering of the guilty verdict and the commencement of the penalty trial.

The California court's characterization of the motion as being made, "in the midst of the jury's guilt phase deliberations" can most charitably be characterized as specious, because the motion was filed on the day the verdict came in, and did not contemplate substitution of counsel in the midst of deliberations; any ambiguity in the January 6th motion was rectified on January 9th when petitioner filed another motion asking to represent himself (C.T. 1268) and when petitioner orally addressed the trial court on January 15th.

Moreover, the California Supreme Court's characterization of the penalty phase as, "merely a stage in a unitary capital trial" for purposes of considering a *Faretta* motion, exalts form over substance and ignores the import of this Court's decision in *Bullington v. Missouri* (1981) 451 U.S. 430. In *Bullington, supra*, the defendant had been tried and convicted of "capital murder" under a Missouri statute very similar to California's statutory scheme. The Missouri law provided that, after the guilty verdict,

> "the court shall resume the trial and conduct a presentence hearing before the jury...at which time the only issue shall be the determination of the punishment to be imposed. In such hearing, subject to the laws of evidence, the jury...shall hear additional evidence in extenuation, mitigation, and aggravation..." Mo. Rev. Stat.§ 565.006.

In *Bullington*, the jury set the punishment at life. The defendant then moved for and was granted a new trial based upon jury selection issues. The prosecutor indicated that he would be seeking the death penalty again and the defendant sought pretrial review which led to the granting of certiorari by this Court.

In its opinion, this Court held that the Double Jeopardy clause applied to the first jury's determination that the punishment should be life because, unlike other sentencing procedures,

> "[t]he presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. **It was itself a trial on the issue of punishment** so precisely defined by the Missouri statutes." *Id.* at 437 (emphasis added)

A similar result was reached a few years later in *Arizona v. Rumsey* (1984) 467 U.S. 203, applying the principles of *Bullington, supra*, to the Arizona capital statute. See also *Young v. Kemp* (11th Cir. 1985) 760 F.2d 1097, 1106 (applying *Burlington* to the Georgia capital statute); *Jones v. Thigpen* (5th Cir. 1984) 741 F.2d 805, 814, *remanded on other grounds*, 106 S.Ct. 689 (1986) ("After *Bullington*, a capital sentencing proceding like Mississippi's is regarded as a second 'trial' at which the prosecution must again 'prove its case' if it is to obtain a death sentence.")

More recently, the applicability of *Bullington, supra*, rationale to the right to counsel and/or self representation, was noted by Justices Marshall and Brennan dissenting from the denial of certiorari in *Grandison v. Maryland* (1986) __U.S.__, 93 L.Ed.2d 174

> "In *Bullington v. Missouri*,...this Court held that the Double Jeopardy clause applied to the sentencing phase of a bifurcated trial. It did so because it found that a sentencing hearing was like a separate trial....It may require selection of a new jury..Evidence is offered...; the parties may present argument...; the jury is instructed,...; and the jury deliberates and determines sentence. The Maryland proceeding is in all respects a separate trial on the issue of punishment. **The waiver of the right to counsel at the first 'trial on guilt or innocence should therefore have no more bearing on a defendant's right to counsel in the sentencing phase that it would on that defendant's right to counsel in a separate trial on related crimes.** It should under no circumstances irrevocably bind a defendant in the sentencing phase." *Id.* 175-176

C

Why this Court Should Grant Certiorari.

This case presents the troubling specter of an accused facing the ultimate sanction of death who was prevented from personally pleading for his life to the jury that ultimately sentenced him to die. There was no ambiguity in his request; petitioner clearly stated that he wanted to be his own lawyer because he felt that,

> "it is my life on the line and I am the one who has to answer to everything that is charged against me, and if I feel that my attorney is not going to represent me adequately..."

In *Faretta*, this Court recognized that there is,

> "a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant

> is contrary to his basic right to defend himself if he truly wants to do so.
>
> *****
>
> "To thrust counsel upon the accused, against his considered wish, thus violates the logic of the [Sixth] Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists....An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense." *Id.* 422 U.S. at 817-820

That analysis applies with even more convincing force when the question to be argued to the jury is not merely whether or not the accused is guilty of a crime, but whether or not the accused will live or die.

Both federal law and California law guarantee that a defendant has the right of "allocution," the right of a defendant to directly address the sentencing body before judgment is pronounced. Fed. Rules Crim. Pro. 32(a)(1); California Penal Code §1200. Under the Federal Rules of Criminal Procedure, if a defendant is denied his right of allocution, the case is automatically reversed and sent back to the trial court for resentencing. See for example, *United States v. Gardner* (9th Cir. 1973) 480 F.2d 929.

This Court has long recognized the importance of that right.

> "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Green v. United States* (1961) 365 U.S.424, 81 S.Ct. 653, 655

There is something very offensive in the notion that "timeliness" could prevent defendant, once he is convicted of a capital crime, from thereafter choosing to dispense with the unwanted assistance of counsel in the presentation of the defense regarding penalty. How can such a motion to proceed *in propria persona* made upon the conclusion of the guilt phase be "untimely" when it is made contemporaneously with the time that the need for penalty proceedings first becomes apparent? Consistent with *Faretta*, a defendant must have the right to personally address the men and women who will decide if he shall remain among the living.

While an attorney's training and experience will undoubtedly make him more skilled in the presentation of and objection to evidence as it relates to guilt or innocence than one unschooled in the niceties of the law, that advantage becomes less significant when the appeal that must be made is to that complicated matrix of value judgments and emotions that are the components of a juror's decision in the sentencing portion of a capital trial. Moreover, this Court has recognized that although,

> "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance...[p]ersonal liberties are not rooted in the law of averages...The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction."

Since this Court issued its opinion in *Faretta, supra*, in 1975, this Court has not directly spoken on the scope of the right to self representation.[8] There can be no more fundamental exercise of the right to self representation expounded by this Court in *Faretta* than when the question is whether or not the accused should live or die.

As this Court has observed,

> "[W]e recognize the defendant's right to defend pro se not primarily our of the belief that he thereby stands a better chance of winning his case, but rather out of deference to the axiomatic notion that each person is ultimately responsible for choosing his own fate, including his position before the law. A defendant has the moral right to stand alone in his hour of trial and to embrace the consequences of that course of action." *McKaskle v. Wiggins, supra*, 465 U.S. at 961 fn. 6, quoting from *Chapman v. United States* (5th Cir. 1977) 553 F.2d 886

In view of the reinstatement of the death penalty in numerous states within the past fifteen years, coupled with this Court's decision in *Faretta*, it is apparent that this issue will not go away. Ultimately, this Court will be called on to resolve this question. Petitioner made a timely motion to personally plead for his own life; he lost the motion and the jury sentenced him to death This Court should grant certiorari to resolve this fundamental question of constitutional law.

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[8] Except in *Mckaskle v. Wiggins* (1984)465 U.S. 168 which dealt with the issue of the role of advisory counsel.

III

THE INSTRUCTIONS OF THE TRIAL COURT COUPLED WITH THE PROSECUTION'S VOIR DIRE AND CLOSING ARGUMENT MISLED THE JURY CONCERNING THE DISCRETION IT HAD TO EXTEND LENIENCY BY INFORMING THE JURY THAT THEY HAD NO CHOICE BUT TO VOTE FOR THE DEATH PENALTY IF THE FACTORS IN AGGRAVATION OUTWEIGHED THOSE IN MITIGATION EVEN IF, UNDER THOSE CIRCUMSTANCES, THE JURORS STILL FELT THAT DEATH WAS NOT THE APPROPRIATE PUNISHMENT

Statement of Facts

At the conclusion of the penalty phase of appellant's trial, the jurors were instructed in the mandatory language of former CALJIC 8.84.2 that,

> "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you **shall** impose a sentence of death." [9] (emphasis added) (R.T. 4669)

During voir dire, the prosecutor told eleven out of twelve jurors who rendered verdicts in appellant's case that the law required that if they found that the aggravating factors outweighed those in mitigation they **must** vote for the death penalty. Moreover, each juror was then asked to promise the prosecutor that if the factors in aggravation outweighed those in mitigation, **they would impose the death penalty.** Naturally, when asked, they promised.

The questioning of juror Garfield Winters is illustrative. The prosecutor first explained that evidence in aggravation was evidence against the defendant and that evidence in mitigation was evidence that was favorable to the defendant. He then asked Mr. Winters,

> "Q. [Y]ou...understand that in your judgment, yours and the other jurors if the evidence against the defendant outweighs the evidence in favor of him, **there is no way around it**, then you have to bring back a verdict of death.
> A. Yes.
> Q. Is that your understanding?
> A. Yes.
> Q. Are you willing to do that if that's how it turns out?
> A. Yes." (R.T. 650) (emphasis added)

Similarly, the prosecutor told juror Sylvia Bania that the judge

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[9] The jurors were also instructed that, "in weighing the aggravating and mitigating factors, you are not to merely count numbers on either side. You are instructed rather to weigh and consider the factors on each side as a whole" (R.T.4664)

"Q. ...will also instruct you that in the event the evidence in aggravation outweighs the evidence in mitigation, that you must bring back a verdict of death?
A. Yes.
Q. All right. In other words, the standard is set, then.
A. Yes
Q. In other words, if you find one of those, **you are bound to that verdict?**
A. Right. (R.T. 1200-1201)"[10]

All the jurors so asked gave the prosecutor their solemn assurance that they would follow the mandatory sentencing scheme as outlined by the prosecutor; they told him that it was understood that they had no choice but to impose the death penalty if they found that the aggravating circumstances outweighed those in mitigation.

Most significantly, neither the judge nor the defense attorney at any time suggested that the jurors' obligation was anything different from that which the prosecutor stated.

Given the mandatory sentencing catechism that occurred during voir dire, when it came to closing argument, it was unnecessary for the prosecution to engage in any extended discussion of the meaning of CALJIC 8.84.2; all the prosecutor had to do was to remind the jurors of the assurances previously given during voir dire to reactivate their promises to adhere to the prosecutor's unconstitutional mandatory sentencing formula.

> "Now remember at the time of the voir dire you all promised that in the event that this case went- to a penalty phase and the aggravation evidence outweighed the mitigation evidence, you would impose the death penalty. Well, that is the case here, and now is the time. You should not let sympathy for the defendant or his family affect your deliberations." (R.T. 4642)

Significantly, at no time during his closing argument did the prosecutor ever suggest to the jurors that their job was not to mechanically impose the death penalty, but, rather, after the weighing process was concluded, to determine if death was the appropriate punishment. Far from correcting, or in any way modifying the mandatory language of CALJIC 8.84.2, **every time** the

[10] A similar promises were extracted from all the other jurors except Henry Berry Jr. who was the first to be voir dired of those eventually selected: David Bergman (R.T. 879:1), Orlow Garrett (R.T. 1435:17), Jose Leal (R.T. 1247:23), Dathelma McNaught-Davis (R.T. 484:11), Ronald Orton (R.T. 1518:16), Kimberly Otto (R.T.740:1), Martha Penny (R.T. 1477:25), Louis Perez (670:8), and Sandra Sheffield (R.T. 750:20).

prosecutor touched upon the subject of the jury's sentencing responsibilities, the prosecutor exploited that mandatory language and hammered away at one insistent theme: if aggravation outweighed mitigation, then it was the jury's legal obligation to impose the death penalty.

At the outset, the prosecutor told the jury that their task was to,

> "consider evidence from both the guilt phase and the penalty phase to determine whether or not the aggravation outweighs the mitigation." (R.T. 4621)

Later on, he told the jury that imposition of the death penalty was a foregone conclusion because of the overwhelming nature of the aggravating evidence.

> "How about all the terror she went through during the perpetration of that robbery and kidnapping before she was finally slaughtered. Right there we could stop. There is more than enough aggravation to inflict the death penalty, because right there it outweighs whatever they could put into mitigation." (R.T. 4623-4624)

Again he told the jury that if aggravation outweighed mitigation, their job was to impose the death penalty.

> "So, ladies and gentlemen, you are the ones who have to add up and come to the total, how does the alleged mitigation stack up against the overwhelming aggravation. In Latin there is a phrase nolo contendere. Do you know what that means? No contest. And that is exactly what it is." (R.T. 4641)

Finally, as indicated *supra*, the prosecutor recalled the jurors' promise to impose the death penalty if the aggravating factors outweighed the mitigating factors.

> "Well, that is the case here, and now is the time. You should not let sympathy for the defendant or his family affect your deliberations." (R.T. 4642)

The prosecutor reminded the jurors of their commitment to vote for the death penalty, as though they were delegates to a political convention, and he was the candidate's floor manager calling in his markers.

B

Petitioner's Death Sentence was Imposed in violation of the Eighth Amendment to the United States Constitution because the jury was misled into thinking that it had no choice but to impose that penalty

if the factors in aggravation outweighed those in mitigation even if it still believed, under those circumstances, that death was not the appropriate punishment.

It is the cornerstone of capital punishment jurisprudence that, "'the penalty of death is qualitatively different' from any other sentence," and as such, "the Eighth and Fourteenth Amendments require that the sentencer...not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that he defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio* (1978) 438 U.S. 586, 604

To ensure constitutionally mandated fairness in the capital sentencing process, this Court has required great certainty that a jury's sentencing conclusion was based upon proper grounds and was not the product of even arguable confusion about the meaning of jury instructions, the prosecutor's penalty phase argument, or both. *Mills v. Maryland* (1988) __U.S.__, 56 U.S. Law Week. 4503, *California v. Brown* (1987) __U.S.__, 107 S.Ct. 837

In *California v. Brown, supra*, four members of this Court (Justices Brennan, Marshall, Blackmun, and Stevens), wrote that CALJIC 8.84.2 (given in petitioner's case) did not provide the constitutionally required assurance that the jury was fully aware of its sentencing discretion. Justice O'Connor's concurring opinion suggested that the effect of the unmodified CALJIC 8.84.2 instruction, when combined with a prosecutor's closing argument that further misinformed or misled the sentencing jury about the substance of the capital sentencing determination, would violate Eighth Amendment standards and require that the penalty verdict be vacated.

Moreover, the California Supreme Court itself has expressed concern that CALJIC 8.84.2 might be misinterpreted. In *People v. Myers* (1987) 43 Cal.3d 250, the court explained that,

> "[W]e were concerned in *Brown* that the unadorned instruction's phrase, 'the trier of fact...*shall* impose a sentence of death if [it] concludes that the aggravating circumstances outweigh the mitigating circumstances' (emphasis added),

> could mislead the jury as to the ultimate question it was called on to answer in determining which sentence to impose. Although the quoted phrase could be understood to require a juror (i) to determine whether 'the aggravating circumstances outweigh the mitigating circumstances' without regard to the juror's personal views as to the appropriate sentence, and then (ii) to impose a sentence of death if aggravation outweighs mitigation even if the juror does not personally believe that death is the appropriate sentence under all the circumstances, we concluded in *Brown* that the statute was not intended to, and should not, be interpreted in that fashion. Instead we stated: 'By directing that the jury "shall" impose the death penalty if it finds that aggravating factors "outweigh" mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the weighing process, *he decides that death is the appropriate penalty under all the circumstances.*"

In petitioner's case, the jurors were never instructed that after the weighing process was complete, they must, "decide[] that death is the appropriate penalty under all the circumstances." As a consequence, the jurors in petitioner's case were both told by the prosecutor in voir *dire*, instructed by the court that once they found that aggravating factors outweighed those in mitigation, their job was complete and their discretion was at an end, even if they still thought, all things considered, that death was an inappropriate punishment in this case.

Clearly, the mandatory sentencing formula applied in petitioners case did, "not permit the type of individualized consideration of mitigating factors...required by the Eighth and Fourteenth Amendments in capital cases." *Lockett, supra*, 438 U.S. at 605

C.

Why this Court should grant Certiorari.

When taken in toto, the prosecutor's elicitation of promises from eleven out of twelve jurors in*voir dire* to impose the death penalty if aggravation outweighed mitigation, even if they still felt that death was inappropriate, the prosecutor's closing remarks reminding the jurors of their promise and demanding that they honor it and the court's instruction that the jury **shall** impose the death penalty if aggravation outweighed mitigation effectively robbed

the jury in petitioner's case of "the individualized consideration...required by the Eighth and Fourteenth Amendments in capital cases."

This Court has already granted certiorari in a case raising similar issues concerning the impact of improper instruction on the law during *voir dire*. *Adams v. Dugger* (11th Cir. 1987) 816 F.2d 1493, *cert. granted* (1988) 108 S.Ct.1106 Petitioner's case should be held until the decision in the *Adams* case so that petitioner may have the benefit of the Court's ruling in that case.

Dated: October 21, 1988

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